“IS THAT THE GUY?” NORTH CAROLINA’S INCLUSION OF THE SHOW-UP IDENTIFICATION PROCEDURE IN THE EYEWITNESS IDENTIFICATION REFORM ACT

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I. INTRODUCTION

“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”¹ Justice Brennan, writing for the Supreme Court in United States v. Wade, continued, “A major factor contributing to . . . mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to the witness for . . . identification.”²

Imagine, if you will, that something terrible happened. You came home, walked through your front door, and an intruder was in your home. He had torn the place apart looking for valuables, and you startled him when you came through the door. He panicked and ran at you, shoving you as he slipped past and ran out the door. You fell to the floor. Your heart was racing. Your mind was wild from the release of adrenaline. You found your phone and, with shaky hands, you dialed 911. You paced the floor as you waited for an officer to arrive. “What if the man comes back?” “He knows what I look like, where I live, what is in my home.” “He knows I saw his face.” “Am I safe?” Finally, the police arrived. Although it had only been a few minutes, it felt like an hour. You described what happened to the officer, but you were

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² Id.
talking so fast that she had to ask you to slow down and repeat yourself. The officer took the report, gave you her card, and left. You were alone again, and the questions returned. “Am I safe?” “Should I stay here tonight?” “What if they don’t find him?”

An hour later, the officer returned and asked if you could come with her to identify someone who might be the perpetrator. You got in the back of her patrol car. It felt weird back there, sitting where the bad guys go. She drove a couple of miles down the road, and you saw another police car parked on the side of the road. An officer you didn’t know was standing with someone who had been handcuffed. Your officer asked, “Is that the man?” You thought it might be. Maybe the clothes were the same? Similar? He was the same race as your perpetrator and had the same general build. Perhaps his hair looked the same? You wanted it to be the guy, but was it? If it was the guy, then you could sleep that night knowing he was off the street. Besides, the police wouldn’t put him in handcuffs if he was innocent, right?

More than a century of psychological research has solidified the fact that human memory is fallible and prone to influence by suggestion. To combat the devastating consequences of misidentification and conviction of innocent persons, jurisdictions across the country are working to reform eyewitness identification procedures to decrease suggestive influence and

3. See Richard Gonzalez et al., Response Biases in Lineups and Showups, 64 J. PERSONALITY & SOC. PSYCHOL. 525, 525 (1993) (describing a show-up as, “[t]he police are called to the scene of the crime, the witness describes the criminal, the police immediately initiate a search, and when they find someone who fits the description they bring the witness to the spot and ask him or her whether the suspect is the culprit.”).

4. Steven E. Clark & Ryan D. Godfrey, Eyewitness Identification Evidence and Innocence Risk, 16(1) PSYCHONOMIC BULL. & REV. 22, 25 (2009) (“The witness’s memory of the perpetrator may be incomplete or inaccurate due to limitations at the time of encoding and storage. In addition, over time, information in the memory trace may be lost or rendered irretrievable due to interference from other information added to memory. These are familiar and standard accounts of the general limitations of memory, . . . Memory may also be altered in very specific ways, due to the witness’s exposure to other sources of information after the crime. Here, we refer to what is called postevent information. There are many sources of postevent information in real criminal cases: Witnesses can be exposed to postevent information through interviewer questions, news reports, and photographs of the suspect.”) (emphasis in original) (citation omitted).

5. See Exonerated by DNA, INNOCENCE PROJECT, https://www.innocenceproject.org/all-cases/#exonerated-by-dna (last visited Jan. 26, 2019) (featuring 363 cases where convicted persons were exonerated by DNA, many of whom spent years in prison for crimes they did not commit).
increase reliability. The Innocence Project has suggested some improvements—including double-blind lineups and photo-array procedures, the use of pre-identification admonitions, and documentation of eyewitness confidence statements—to diminish the likelihood of suggestive influence on suspect identification. North Carolina is one of a handful of states that has codified these eyewitness identification reforms into law. In 2007, the Eyewitness Identification Reform Act (“EIRA”) outlined objective suspect presentation procedures and required all jurisdictions in the state to comply with those procedures or face exclusion of ill-gotten identification evidence.

But EIRA was amended in 2015 to include an inherently suggestive suspect presentation procedure called a “Show-Up.” With all the progress and research aimed at decreasing or eliminating suggestion from the suspect identification process, it is a mystery why the show-up continues to fly under the radar as an acceptable identification modality. Unlike a live lineup or a photo array, where a suspect is mixed with a number of foils who share common characteristics, a show-up is a one-on-one presentation of the suspect to the witness. These presentations generally take place in the field, shortly after the crime has occurred, while the

8. North Carolina House Committee Approves Eyewitness ID Reform Bill, INNOCENCE PROJECT (Apr. 27, 2007), https://www.innocenceproject.org/north-carolina-house-committee-approves-eyewitness-id-reform-bill (noting that North Carolina was one of six states at that time to have addressed identification reform through the legislative process).
9. N.C. GEN. STAT. ANN. § 15A-284.52(d)(1) (2018) (“Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.”).
11. N.C. GEN. STAT. ANN. § 15A-284.52(c1) (2018). (“A show-up conducted by State, county, and other local law enforcement officers shall meet all of the following requirements: (1) A show-up may only be conducted when a suspect matching the description of the perpetrator is located in close proximity in time and place to the crime, or there is reasonable belief that the perpetrator has changed his or her appearance in close time to the crime, and only if there are circumstances that require the immediate display of a suspect to an eyewitness. (2) A show-up shall only be performed using a live suspect and shall not be conducted with a photograph. (3) Investigators shall photograph a suspect at the time and place of the show-up to preserve a record of the appearance of the suspect at the time of the show-up procedure.”).
12. Gonzalez et al., supra note 3, at 525.
suspect is detained and often in handcuffs.\textsuperscript{13} The Supreme Court has upheld the constitutionality of show-ups and has gone to great lengths to explain the suggestive effects that one-on-one presentations of a detained suspect have on a traumatized victim. The Court has articulated a two-step analysis, which most states use, that allegedly balances impermissible suggestiveness with indicia of reliability.\textsuperscript{14} An extreme minority of states have opted not to follow the Supreme Court’s guidance. These states have created a narrower analysis of show-up identification, which tends to exclude identification that has been improperly obtained.\textsuperscript{15}

While many people outside the criminal justice system may be unfamiliar with the show-up eyewitness identification procedure, it is a commonly deployed investigation technique used in thirty to seventy percent of eyewitness identification cases.\textsuperscript{16} It is a commonly held belief among researchers who study eyewitness perception that show-ups are inherently suggestive.\textsuperscript{17} One reason for this belief is the fact that, unlike a lineup or photo array where there are several foils presented with the suspect, in a show-up, it is apparent to the witness who the police think the perpetrator is.\textsuperscript{18} Another reason for this belief is confirmation bias, which happens when a person presented with a single suspect in a show-up may have a subconscious desire for the person detained to be the right person.\textsuperscript{19} Additionally, in one study using a field-simulation of a show-up identification, researchers noted that “when asked directly if they assumed the police must have the right guy based on the fact that he was already in handcuffs, just

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\textsuperscript{13} Id. (explaining that show-ups are sometimes referred to as “in-field identification or a drive by”) (emphasis in original).
\textsuperscript{14} See id. at 526.
\textsuperscript{15} State v. Herrera, 902 A.2d 177, 181 (N.J. 2006) (discussing Massachusetts, New York, and Wisconsin, all of which have narrowed the Supreme Court two-step analysis in some way).
\textsuperscript{16} Eisen et al., supra note 10, at 1.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Gonzalez et al., supra note 3, at 533 (“This bias may involve both motivational and cognitive processes. The witness may feel a sense of accomplishment at having found a best match, or the process of eliminating lineup members may increase the salience of the best match. The presence of five people who look less like the perpetrator may make the match appear better than it actually is. Confirmatory biases may also result from attempts to explain why the particular lineup member is the best match. In the show-up the only task of the witness is to decide if the suspect presented is or is not the perpetrator; there can be no biases resulting from finding a best match.”).
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over twenty percent of participants in the field condition said ‘yes.’”

This comment will argue that the show-up has no place in the modern criminal justice system and that North Carolina’s recent adoption of the show-up in its Eyewitness Identification statute is a step in the wrong direction. Given the ubiquitous nature of cell phones, tablets, and computers, it is ludicrous to allow these obviously suggestive identification procedures to continue when a photo array can be put together in a matter of minutes. Criminal defendants are guaranteed due process of the law, and the show-up makes a mockery of that constitutional promise.

II. BACKGROUND

Eyewitness misidentification is the leading cause of wrongful convictions in the United States; since the 1990s, DNA evidence has been used to free hundreds of wrongfully convicted people from prison. Of those freed, seventy to seventy-five percent were convicted at least in part based on eyewitness misidentification. In a quarter of those cases, the innocent subject was identified by more than one eyewitness. Years of research on eyewitness identification have yielded specific evidence-based procedures to reduce the likelihood of misidentification in line up and photo-array procedures.

In 2007, North Carolina enacted EIRA, which employed evidence-based practices to improve the reliability of eyewitness
identification. The North Carolina Department of Justice prepared an instructional packet in 2008 to explain the compulsory change in identification procedures and to provide forms and instructions for law enforcement officers to follow. In these instructions the Department noted,

In recent studies of eyewitnesses and human memory it has been suggested that eyewitness evidence is much like trace evidence left at a crime scene. Like trace evidence, eyewitness memory is an imprint left in the mind of the witness. But also like trace evidence, it is susceptible to contamination if not handled properly. The result can be failure to identify the true perpetrator or erroneous identification of an innocent person.

EIRA outlines specific procedures for the State to follow in an effort to avoid witness coercion and obtain reliable suspect identification. These procedures include the use of neutral parties in the administration of a photo-array or live lineup as well as documentation of confidence statements made after an


30. *Id.*

31. N.C. GEN. STAT. ANN. § 15A-284.52(b)(3) (2018) (“Before a lineup, the eyewitness shall be instructed that: A) the perpetrator might or might not be presented in the lineup; B) the lineup administrator does not know the suspect’s identity; C) the eyewitness should not feel compelled to make an identification; D) it is as important to exclude innocent persons as it is to identify the perpetrator; and E) the investigation will continue whether or not an identification is made. The eyewitness shall acknowledge the receipt of the instructions in writing. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the acknowledgement and shall also sign the acknowledgement.”).
identification has been made. EIRA even provides a script for an admonition or witness instruction that must be conveyed to a witness prior to the identification procedure, which includes the fact that the perpetrator may not be in the lineup and that the crime will continue to be investigated with or without an identification by the witness. The procedures outlined in the 2007 EIRA track exactly with the recommendations developed by the Innocence Project after years of scholarly psychological research and empirical testing. They provide fair and neutral means to effectuate an identification that protects the rights of the accused, and also prevent intentional and unintentional witness coercion by investigators. Given the NC Department of Justice’s sweeping reforms to implement these evidence-based practices, the addition of the show-up procedure to EIRA in 2015 is antithetical to its purpose. Rather than striking the show-up from the list of acceptable techniques, the General Assembly has chosen to place a stamp of approval on an inherently suggestive practice.

EIRA provides guidelines for how and when a show-up may be employed for eyewitness identification:

A show-up may only be conducted when a suspect matching the description of the perpetrator is located in close proximity in time and place to the crime, or there is reasonable belief that the perpetrator has changed his or her appearance in close time to the crime, and only if there are circumstances that require the immediate display of a suspect to an eyewitness.

The problem with this language is that it does not take a lot of wrangling to turn a situation into one that could arguably require the immediate display of a suspect. Finding someone who

32. Eyewitness Identification Reform Act Update Material, supra note 29, at 9 (“Ask the witness to tell you in their own words their level of confidence that the person they have identified is the perpetrator.”).

33. Id. at 7.

34. Brown & Saloom, supra note 6, at 540–43; Eyewitness Identification Reform, supra note 28 (outlining the Innocence Project’s recommendations for eyewitness identification reform).

35. See Eyewitness Identification Reform, supra note 28.

matches a suspect description does not generally give rise to probable cause to make an arrest, yet that situation alone may allow police to effectuate a show-up so they could then make an arrest based on the eyewitness identification.37

Unlike the evidence-based lineup and photo array procedures outlined in the EIRA, there is no non-suggestive way to conduct a show-up because single-suspect presentation is inherently suggestive on its own.38 While one study found that the rate of error for lineup misidentification was similar to show-up misidentification, it was noted that a misidentification in a show-up is a “dangerous misidentification” because the innocent person has been identified as the perpetrator.39

III. ANALYSIS

While the show-up is a flawed and dangerous procedure, it is a commonly employed technique across the nation.40 Many states apply a two-step analysis to determine the admissibility of suggestive identification procedures that was first endorsed by the Supreme Court in 1977.41 The second step of the analysis is flawed because it allows even the most impermissibly suggestive identification procedure to pass muster so long as there are other indicia of reliability. A few states have broken away from the two-step analysis in a way that provides heightened protection from accidental misidentification.42 North Carolina should follow their lead.

37. Probable Cause, LEGAL INFO. INST., https://www.law.cornell.edu/wex/probable_cause (last visited Mar. 18, 2018) (stating that “Probable Cause arises when ‘the totality of the circumstances, meaning everything that the arresting officers know or reasonably believe at the time the arrest is made.’”).


39. Id. at 350–51 (explaining that errors in lineups also include witnesses picking foils, whom the police are aware are not the perpetrator).


A. The Supreme Court of the United States Weighs in on the Show-Up

Because of the Fifth and Fourteenth Amendment implications of flawed eyewitness identification procedures, cases involving convictions that were supported by show-ups have occasionally made their way to the Supreme Court of the United States. In 1967, the Court decided Wade v. United States and Stovall v. Denno on the same day; both of these cases discussed show-ups and provided some guidance about how and when they would be considered constitutionally acceptable.

Wade was the first case in which the Supreme Court made any mention of the show-up procedure, stating “[t]he pretrial confrontation for purpose of identification may take the form of a... ‘showup,’ as in the present case, or presentation of the suspect alone to the witness.... It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification.” The Court remarked at length about the fallibility of eyewitness identification in general, noting that “[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.”

Stovall involved a show-up where police came to a stabbing victim’s hospital room with a suspect handcuffed to a uniformed officer. The victim had been stabbed eleven times and her doctors were unsure that she would survive. Her husband, who had also been attacked, did not survive. On appeal of his conviction, the defendant claimed that the identification procedure was so suggestive and “conducive to irreparable mistake that he was denied due process of the law.”

45. Wade, 388 U.S. at 229.
46. Id. at 228.
47. Stovall, 388 U.S. at 295.
48. Id.
49. Id.
50. Id. at 302.
recognized that single-presentation of a suspect to a witness has been “widely condemned,” it adopted a fact-specific “totality of the circumstances” analysis, and affirmed the lower court’s holding that it was questionable whether the witness in this case was actually going to survive and that it was her alone who could free the suspect should she indicate that he was not her assailant.\footnote{Id.\,\textsuperscript{51}} For these reasons, the circumstances warranted the procedure, and the Court held that the show-up did not violate the defendant’s due process rights.\footnote{Id.\,\textsuperscript{52}}

Ten years later, the Court heard\textit{Manson v. Brathwaite}, the opinion that articulated the factors and two-step analysis for admissibility\footnote{Manson v. Brathwaite, 432 U.S. 98, 114 (1977).\,\textsuperscript{53}} used by most states today.\footnote{Three states have deviated from the two-step analysis articulated in\textit{Manson}: New York, Wisconsin, and Massachusetts. State v. Herrera, 902 A.2d 177, 181 (Mass. 2006).\,\textsuperscript{54}} In this 1977 case, the Court held that “reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-
\textit{Stovall} confrontations.”\footnote{\textit{Manson}, 432 U.S. at 114.\,\textsuperscript{55}} The Court discussed the factors to be weighed in consideration of eyewitness identification reliability, including “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.”\footnote{Id.\,\textsuperscript{56}} The Court indicated that these must be viewed in balance with the “corrupting effect of the suggestive identification itself” in order to determine if the procedure is admissible.\footnote{Id.\,\textsuperscript{57}} Thus, the inquiry is first, whether the procedure was impermissibly suggestive; second, even if it was, is it nevertheless reliable?\footnote{Herrera, 902 A.2d at 183.\,\textsuperscript{58}} If the answer to part two is yes—based on the\textit{Manson} factors—then it is admissible.\footnote{Id. at 182–83 (discussing more restrictive alternatives to the Supreme Court’s formulation but analyzing the case at bar using the two-step analysis).\,\textsuperscript{59}}
B. North Carolina Courts Follow the Supreme Court’s Two-Step Analysis

The North Carolina Supreme Court expressly follows the analysis outlined by *Manson* and applies the “Manson Factors.” On the heels of the 2015 EIRA reforms, a defendant challenged his conviction, based largely on a show-up identification, and the North Carolina Court of Appeals reaffirmed the State’s reliance on the two-step analysis.

In the 1982 case *State v. Turner*, the North Carolina Supreme Court was faced with a challenge to an identification made by a seventeen-year-old girl who had been assaulted in her home. Though she did not know her attacker personally, she had seen him in the neighborhood and was able to provide a description. Less than an hour later, the police brought a suspect to her home, where she positively identified him as the intruder. On appeal, the North Carolina Supreme Court applied the *Manson* factors and noted that “the primary evil sought to be avoided is the substantial likelihood of irreparable misidentification,” and that “an unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where . . . under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability.” Due to the weight given to reliability under the *Manson* factors, the court held that the identification was admissible. This is exactly the type of identification that is impermissibly suggestive. As will be discussed below, removing the second step of the analysis would bar this type of identification. It is hard to imagine the emotions and thoughts of an assault victim

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64. *Id.*
65. *Id.* (emphasis added).
66. *Id.* at 364, 289 S.E.2d at 373.
67. *Id.* at 365, 289 S.E.2d at 374 (“Applying these factors to the case at bar we conclude, from the totality of the circumstances, that evidence of Eddy Mungo’s pretrial identification of defendant at a one-man show-up was sufficiently reliable to be admissible despite any suggestiveness of the procedure.”).
having a suspect brought to her home for identification in the immediate aftermath of the crime.

After the 2015 revision of EIRA, the North Carolina Court of Appeals had the opportunity to revisit the show-up in *State v. Malone*.68 The defendant, who was identified, in part, through what he regarded as a show-up, argued that the procedure violated EIRA and his constitutional rights.69 In this case, a witness saw and identified the defendant from the window at the District Attorney’s office in the courthouse, seemingly by coincidence.70 Because the defendant raised EIRA in his appeal, the court discussed and applied the Act to the identification procedures used.71 Though the court determined that the sighting of the defendant from the courthouse window was not a show-up,72 the court went on to discuss the other identification procedures used in the context of EIRA.73 In doing so, it ratified the use of the two-step analysis in stating,

First we must determine whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification. If this question is answered in the negative, we need proceed no further. If it is answered affirmatively, the second inquiry is whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification.74

69. *Id.* at 649–50.
70. *Id.* at 646.
71. *Id.* at 652.
72. *Id.* (“There is no evidence in the record to support Defendant’s argument the witnesses looking outside the courthouse window at the exact moment Defendant exited a police car was a coordinated act by the District Attorney’s office to have the witnesses view Defendant in-person. Although the circumstances seem suspicious, we cannot determine the District Attorney’s office conducted an impermissible show-up.”).
73. *Id.* at 645–49. There were multiple witnesses and multiple methods of obtaining identification in this case. The defendant specifically raised the identification that occurred through the window in his appeal, but the court also discussed the other identification procedures in light of EIRA and the Supreme Court’s guidance in admissibility of identification. *Id.*
74. *Id.* at 650 (quoting *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984)).
Though there was no show-up, the court did find that the other procedures used to secure an identification were impermissibly suggestive and had low indicia of reliability; therefore, they ordered a new trial.75

North Carolina’s EIRA sets out the procedures for eyewitness identification procedures with the specific intent to reduce suggestibility and outlines the correct way to present suspects for identification in a way that protects the rights of the accused and decreases the likelihood of misidentification.76 The addition of the show-up to EIRA will continue to allow impermissibly suggestive procedures to infect North Carolina’s administration of justice.

C. Stepping Back from Step Two: A Narrower Approach

“In the past Federal constitutional guarantees, as interpreted by the Supreme Court, generally satisfied and often exceeded the requirements of comparable provisions of the State Constitution. But there would be no need for an independent State Bill of Rights if that were always the case.”77 Two states found that the protections afforded to defendants by the United States Constitution, as related to suggestive identification procedures, are insufficient to protect their citizens, and each interpreted greater protections in their individual state constitutions.78

Both New York and Massachusetts have declined to adopt step two of the Manson analysis when assessing a show-up; instead, if there is an affirmative answer to step one, which asks whether the identification was impermissibly suggestive, then the identification is per se inadmissible.79 In 1995, Massachusetts reaffirmed their use of the per se exclusionary rule for impermissibly suggestive show-ups in Commonwealth v. Johnson.80 The court discussed at length the reason for its continued

75. Id. at 652–65.
76. Eyewitness Identification Reform Act Update Material, supra note 29.
80. Johnson, 650 N.E.2d at 1264.
endorsement of the rule, concluding: “Our past resistance to the 
so-called reliability test reflects this court’s concern that the 
dangers present whenever eyewitness evidence is introduced 
against an accused require the utmost protection against mistaken 
identifications.”81 The court indicated that “[t]he ‘reliability test’ 
is unacceptable because it provides little or no protection from 
unnecessarily suggestive identification procedures, from mistaken 
identifications and, ultimately, from wrongful convictions.”82

The Supreme Judicial Court of Massachusetts, which 
decided Johnson and reaffirmed that court’s adherence to the per 
se exclusionary rule, was particularly persuaded by Justice 
Marshall’s dissent in Manson v. Brathwaite, which stated that “the 
dangers of mistaken identification are, as Stovall held, simply too 
great to permit unnecessarily suggestive identifications. Neither 
Biggers nor the Court’s opinion today points to any contrary 
empirical evidence. Studies since Wade have only reinforced the 
validity of its assessment of the dangers of identification testimony.”83

D. North Carolina Should Adopt the Massachusetts One-
Step Test

The Innocence Project highlights the cases of twelve North 
Carolinians who were convicted of serious crimes based on 
eyewitness testimony and later exonerated by DNA evidence.84 At 
least two of those convictions were, at least in part, based on a 
show-up procedure.85 North Carolina can do better for its citizens.

81. Id. at 1261.
82. Id. at 1262.
83. Id. (quoting Manson v. Brathwaite, 432 U.S. 98, 125 (1977) (Marshall, J., dissenting)). Neil v. Biggers, which is mentioned by Justice Marshall in his dissent, falls in 
line with Wade and Brathwaite in asserting that a totality of circumstances and factors that 
indicate reliability can overcome an impermissibly suggestive identification procedure, 
such as a show-up. Manson, 432 U.S. at 125 (1977); see Neil v. Biggers, 409 U.S. 188 (1972).
84. Featured Cases, INNOCENCE PROJECT, https://www.innocenceproject.org/all-
cases/# eyewitness-misidentification,north-carolina,exonerated-by-dna (last visited Feb. 22, 
2018). This site shows featured cases from around the nation. Id. I used the filter option 
to drill down to cases from North Carolina where it was eyewitness identification was the 
basis for the arrest and conviction and where the defendant was later exonerated by DNA. 
At least two of the cases featured include show-up identification procedures: Lesly Jean 
and Joseph Abbit. Id.
85. Id.
North Carolina should adopt the one-part analysis discussed in *Commonwealth v. Johnson* and take a stand against suggestive procedures, as originally intended in the 2007 EIRA. Implementation of the per se exclusion of impermissibly suggestive show-ups will ensure that the procedure is used only in the narrowest of circumstances. The procedure for a show-up as outlined in EIRA is narrow; however, the statute itself indicates that failure to follow the procedures outlined therein will only be a factor in a motion to suppress. During motions *in limine*, the court employs the two-step analysis and continues to let in impermissibly suggestive identifications so long as they find that they have indicia of reliability. Removing the second prong of the analysis will ensure that North Carolina courts take an exacting look at show-up procedures and, in doing so, will discourage their use.

With the in-car technology that is available to law enforcement officers today, there is no reason to use a show-up. The show-up should be removed from EIRA and replaced with provisions for a field administration of a computerized photo array. Some states and individual jurisdictions have started using computer software for this exact purpose, including Asheboro, North Carolina, which uses eLineup. According to its website, eLineup ensures the use of best practices and guides both the witness and administrator though the procedure. The program is able to draw from a nationwide pool of photos, controls for demographics, and records both the lineup administration and

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86. *Eyewitness Identification Reform Act Update Material, supra* note 29.
87. N.C. GEN. STAT. ANN. §15A-284.52(c1)(1) (2018) (“A show-up may only be conducted when a suspect matching the description of the perpetrator is located in close proximity in time and place to the crime, or there is reasonable belief that the perpetrator has changed his or her appearance in close time to the crime, and only if there are circumstances that require the immediate display of a suspect to an eyewitness.”).
88. N.C. GEN. STAT. ANN. §15A-284.52(d)(1) (2018) (“Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.”).
92. eLineup, supra note 21.
witness’s identification. When an officer identifies a suspect, rather than driving the witness to see this person in handcuffs, the officer could add the suspect’s photograph into the software and allow it to create and administer a photo-array lineup. This not only eliminates the probability of suggestion, but also preserves the identification for the record.

As currently written, EIRA’s provision for a show-up procedure indicates that photographs cannot be used. I agree that bringing a single photograph of a suspect to a witness is procedurally unsound. My proposition is to replace the show-up with a photo lineup, not simply replace one bad procedure with another. The North Carolina General Assembly should revise EIRA to remove the show-up from the language of the statute and instead include provisions for a field based photo array using lineup software. The only benefit of a show-up—to promptly clear suspects—is achievable through this method without subjecting the witness to the unduly suggestive show-up procedure.

IV. CONCLUSION

When the General Assembly enacted EIRA in 2007, it placed North Carolina among a small group of states working to protect their citizens from accidental misidentification. It is inconceivable why, in 2015, the show-up was added to a statute imbued with evidence-based practices. The goals of EIRA do not square with the use of a show-up. As discussed in this Comment, there is a better way to present a suspect to a witness that protects the administration of justice from dangerous identification practices.

93. Id.
94. See id.
95. See id.
96. N.C. GEN. STAT. ANN. §15A-284.52(c1)(2) (2018) (“A show-up shall only be performed using a live suspect and shall not be conducted with a photograph.”).
97. IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION, supra note 40, at 28.